Malayan Thread Co Sdn Bhd v Kawan Supermarket Sdn Bhd

HIGH COURT (JOHORE BAHRU) — COMPANIES (WINDING-UP) NO 42-3 OF 1988
ABU MANSOR J
18 FEBRUARY 1989

Civil Procedure — Costs — Winding up — Tender and acceptance of post-dated cheques prior to presentation of petition — Whether suit maintainable at date of presentation of petition — Whether petition vexatious — Which party should bear costs of petition

The petitioner had, by letter dated 16 December 1987 to the respondent, demanded payment of the sum of $5079.98. By a letter dated 21 December 1987, the respondent gave reasons disputing the amount claimed and enclosed two cheques post-dated to 31 January 1988 and 28 February 1988 for the lesser sum which they maintained was in fact due. The said cheques were not rejected by the petitioner who nevertheless presented the petition to wind up the respondent on 8 January 1988. The respondent applied for the petition to be dismissed with costs to be taxed. The parties subsequently agreed to the dismissal of the petition and the only issue before the court was who should bear the costs of the petition.

Held, awarding costs to the respondent:

(1) As the petitioner had finally admitted that full tender had been given by the respondent, there would have been no necessity of filing the petition had the petitioner properly considered the respondent's contentions that a lesser sum was due and waited for the cheques to be cleared.

(2) In view of the judicial time wasted and the trouble and expense caused to the respondent by the unnecessary filing of the petition, the petition was vexatious and costs would be ordered against the petitioner.

(3) As the cheques tendered were post-dated, the suit was maintainable at the date of filing of the petition and accordingly, the court would not order costs against the petitioner's counsel personally.

[*Editorial Note*: The petitioner has appealed to the Supreme Court vide Civil Appeal No 02-73 of 1989.]

Cases referred to

1 *Karpal Singh* v *Atip bin Ali* [1987] 1 MLJ 291 (distd)
2 *Mitra & Co* v *Thevar & Anor* [1960] MLJ 79 (distd)
3 *Re Flagstaff Silver Mining Co of Utah* (1875) 20 LR Eq 268 (refd)

Legislation referred to

Companies Act 1965 s 218

M Pathmanathan for the respondent.
Ong Ban Chai for the petitioner.

Cur Adv Vult

Abu Mansor J: This is an appeal by the petitioner/appellant against the award of costs in favour of the respondent/applicant upon the respondent/applicant applying by notice of motion dated 13 August 1988 that the winding-up petition be dismissed with costs to be taxed.

The notice of motion was first fixed for hearing on 17 August 1988 and on that date counsel for the petitioner/appellant only appeared and informed the court that the parties had agreed that the petition be dismissed and that costs were to be borne by the applicant/respondent.

It transpired that there was a 'miscommunication' between the parties and upon protest, vehemently I would say, by the applicant's counsel that in fact there was no such agreement as to the costs, the court's order of 17 August 1988 relating to costs only was agreed to be set aside and parties finally agreed that the only issue before the court was who should bear the cost of the petition, either the appellant/petitioner or the applicant.

Finally at the hearing of this notice of motion on 25 January 1989, I made an order that the appellant/petitioner should bear the costs of the petition and against this order the appellant/petitioner appeals.

The sequence of events that led to the applicant making this application by way of notice of motion that they be granted costs upon the dismissal of the petition are as follows.

The petitioner/appellant filed their petition for winding up on 8 January 1988. It is the contention of the applicant that the petitioner filed the winding-up petition prematurely as, so the applicant contended, there was tender by him within the period of 21 days of the letter of demand written by the appellant on 16 December 1987 (YK-1). In YK-1, according to the petitioner, the amount that should be settled by the applicant was $5,079.98. The applicant disputed that amount and by a letter dated 21 December 1987 (YK-2), the applicant gave their reasons as to why they did so and they maintained that the amount due for settlement was only $4,269.46 and together with that letter they forwarded two cheques, Nos 342117 and 342118. One cheque was post-dated to 31 January 1988 and the second cheque to 28 February 1988. It is not disputed that the two cheques sent vide YK-2 were not rejected by the appellant/petitioner, but despite the same, the petitioner presented the petition to wind up the applicant on 8 January 1988 and served the same vide their solicitors' letter dated 27 January 1988 (YK-3). By letter dated 2 February 1988 (YK-4), the applicant strongly protested against the presentation of the petition. A further letter dated 23 June 1988 (YK-5) was sent to the appellant's solicitors inquiring if the petition had been withdrawn. By their reply dated 30 June 1988 (YK-6) the petitioner/appellant's solicitors requested for costs and interests as a condition for withdrawal of the petition. In the applicant's reply dated 26 July 1988 (YK-7), the applicant stated 'Your Mr Ong Ban Chai had intimated in the telephone conversation that your clients conceded that the actual amount due to your clients was $4,269.46 as stated in our letter dated 21 December 1987 and have

accepted the payments for the said sum as per those two post-dated cheques enclosed'.

The applicant contended that they verily believed that upon acknowledgement and acceptance of a lesser sum of the debt due, the petitioner had waived the effect of the notice dated 19 November 1987 (YK-8) issued pursuant to s 218 of the Companies Act 1965. The applicant contended that by reason of that acceptance, the petitioner was no longer a creditor within the meaning of s 218 of the Companies Act 1965 and further in view of the accord and satisfaction of the debt due to the petitioner well before 8 January 1988, the applicant contended further that the respondent's contention that the applicant had neglected within the meaning of s 218 of the Companies Act 1965 was therefore defeated. For the proposition that the petitioner was no longer a creditor, the applicant cited *Palmer's Company Law* Vol 1 p 1118 which provides and I quote:

> Payment or tender
>
> If the company pays the debt before the petition is presented the creditor ceases to be a creditor for the purposes of ss 222(e), 223 and 224.

Counsel further submitted that since there was satisfaction by the applicant, the winding-up petition was vexatious and he prayed for its dismissal with costs to the applicant. As for costs, counsel for the applicant urged further that the court should award solicitor and client costs instead of party and party costs under O 59 r 8(c) of the Rules of the High Court 1980 directing the solicitors to give indemnity as to costs. In support of this contention he cited the case of *Karpal Singh* v *Atip bin Ali*[1] which applied the principle of the case of *Mitra & Co* v *Thevar & Anor*[2] where the facts therein justified costs being ordered to be paid personally by the solicitor.

The applicant's counsel submitted similarly that in the present case, the petitioner's counsel should pay the cost as it was unreasonable that the petition should have been presented after payment was tendered and ample notice was given by the applicant's counsel to have the petition withdrawn. Counsel applied that the court should exercise its discretion in the applicant's favour as he alleged that the petitioner's counsel had clearly abused the process of the court since the amount was paid before the petition was presented.

In reply, Mr Ong Ban Chai, counsel for petitioner submitted that it is not disputed that the solicitor for the applicant did tender two cheques by their letter dated 21 December 1987 (YK-2). It is also not disputed that no reply was given and without waiting for the cheques to be cleared the petitioner filed the petition on 10 January 1988 and had the petition issued. He said that the debt was an old one arising in 1985 and 1986. He said the question was whether the petitioner should pay the cost and according to the authority cited by the applicant's counsel, *Palmer*, it is said if the debt is paid before the presentation of the petition then the petitioner is not a creditor, but in this case he contended that payment was made on 28 December 1987 by two post-dated cheques. The plaintiff was willing to have the petition withdrawn if the applicant paid the cost of the petition. He submitted further that the claim of the petitioner was $5,079.00 and the two cheques paid by the applicant was $4,269.00 and the cheques were dated 31 January 1988 and another 28 February 1988 and the two cheques were only cleared on those dates. He submitted that the debtor was at fault since they gave two post-dated cheques. He submitted that the party who is diligent must get the cost of any action.

The petitioner's counsel submitted that according to the *Re Flagstaff Silver Mining Co of Utah,*[3] after the presentation of the petition if debt is paid thereafter, costs should be on the debtor and in this case, costs should be on the debtor as the tender was not a full amount that is claimed by the petitioner.

As I have said the only issue before me was the question of who should bear the cost in the circumstances, whether the petitioner or the applicant, and it is settled law that cost is in the discretion of the court and such discretion is to be judicially exercised. One of the relevant factors that weighed on the court to give costs was whether the process of the court had been abused as to warrant the court to award cost against the petitioner. For this we have to look back at the facts of this particular case whether the filing of the petition by the petitioner on 10 January 1988 was showing such abuse. It must be remembered at the outset that the initial tender of $4,269.00 through the applicant's letter dated 21 December 1987 (YK-2) finally resulted in the admission by the petitioner that full tender was given which resulted in the petitioner having to withdraw the petition. The court came to the conclusion that such being the case, the filing of the petition would not have been necessary if only the petitioner had properly considered what was contended by the applicant in their letter dated 21 December 1987 (YK-2) giving details of what payments had been made and how the applicant arrived at their final figure of $4,269.46. It is not denied that this debt went back to 1985 but at the same time the petitioner had no right to just brush aside the applicant's contention of having made payments in their said letter. If the petitioner had properly considered, they would have discovered that to all intents and purposes, the grievance of the debtor in their letter of 21 December 1987 (YK-2) was a genuine grievance and if the grievance had been examined in detail and the petitioner had the good will to wait for the cheques to be cleared, it is clear that there would have been no necessity for filing this petition. It is being said time and time again that the court should be wary that its process should not be abused and the court

will not allow its list being cluttered and will award costs to punish those who do so. In the context of our present backlog today, the conduct of the petitioner in this instant case left much to be desired for by their filing one more unnecessary suit when the courts are seriously attempting to bring down such backlog, judicial time has been wasted in addition to the unnecessary trouble and expense the petitioner was causing the applicant. I agree with the applicant's counsel's contention that the petition was vexatious. Counsel must also have judicial notice of the backlog the court is facing and since counsel for the petitioner has not done so, I therefore award costs against the plaintiff in this matter. By the same order I also refused the applicant's counsel's prayers that solicitor and client cost be awarded to the applicant. I did so because on the authority of *Karpal Singh* v *Atip bin Ali*,[1] counsel can be made to pay the cost of the action if the suit is conspicuously unmaintainable. I rule that this is not the case in our present petition. On the facts of the case, it is clear that on the date of the filing of the petition, 10 January 1988, because the cheques were post-dated up to 28 February 1988, the suit was maintainable but costs was given against the petitioner for filing an unnecessary petition for the reason that they could have waited for the cheques they had duly accepted to be cleared on 28 February 1988 and would have found that the claim would have been satisfied and there would have been no necessity to file the petition, thereby causing much difficulty to all concerned.

I am of the view that the petitioner, in filing the petition on 10 January 1988 without waiting for the cheques to be cleared, did it with his eyes open to the risk involved. The proper action for the petitioner, if they could not accept the cheques, should have been to give the debtor a reply to their letter of 21 December 1987 to which reply they are entitled to, returning the cheques as to give notice to the debtor that their payment was rejected and then filing the petition. I am of the view that the filing of the petition, while at the same time keeping and cashing the cheques on 28 February 1988, was an action in bad taste to say the least, if not mischievous and the petitioner accepted all the risks. For these reasons mentioned, I therefore award costs against the petitioner. The petitioner appeals against this decision and subsequently upon an application by notice of motion made by the petitioner/appellant for leave to appeal to the Supreme Court, leave to appeal was duly granted by me.

Appeal dismissed.

Solicitors: *Yusuf Lee Pathma & Marbeck*; *Ong Ban Chai & Co.*

Reported by *Michelle Rasanayagam*